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No. 01-958

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IN THE

Supreme Court of the United States

CHRIS WOODALL AND COLUMBIA RIVER GORGE COMMISSION,
Petitioners,

v.

SKAMANIA COUNTY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Washington

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PETITIONERS' JOINT REPLY BRIEF

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TABLE OF CONTENTS

	Page
TABLES OF AUTHORITIES	ii
PETITIONERS' JOINT REPLY BRIEF	1
I. PETITIONERS HAVE NOT MISCHARACTERIZED THE DECISION OF THE WASHINGTON COURT OF APPEALS AND THE ARGUMENTS ADVANCED BY THE PARTIES BELOW	1
II. RESPONDENT'S ASSERTION THAT THE GORGE COMMISSION SHOULD MERELY CLARIFY ITS RULES DOES NOT RESOLVE THIS CASE	3
CONCLUSION	6

TABLE OF AUTHORITIES

CASES	Page
Eklund v. Clackamas County, 583 P.2d 567 (Or. App. 1978)	2
Fountain Village Development Co. v. Multnomah County, 31 P.3d 458 (Or. App. 2001)	2
State ex rel. Dyer v. Sims, 341 U.S. 22 (1951)	4
STATUTES AND RULES	
16 U.S.C. § 544d(g)	4
Or. Rev. Stat. § 215.130	2
Supreme Court Rule 16.6	1

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PETITIONERS' JOINT REPLY BRIEF

Pursuant to Rule 16.6, Petitioners reply to two new issues raised by Skamania County in its Brief in Opposition (Opp. Br.): (1) that Petitioners have mischaracterized the Washington Court of Appeals' holding and the arguments of the parties below (Opp. Br. 3); and (2) that Petitioner Columbia River Gorge Commission can simply amend its uniform standards to clarify its intended meaning for the provisions at issue (Opp. Br. 5-8).

I. PETITIONERS HAVE NOT MISCHARACTERIZED THE DECISION OF THE WASHINGTON COURT OF APPEALS AND THE ARGUMENTS ADVANCED BY THE PARTIES BELOW.

Respondent mistakenly asserts that the Petitioners have mischaracterized both the decision of the Washington Court and the arguments of the parties below.

First, Petitioners and the Respondent have both correctly stated the opinion of the Washington Court of Appeals. Respondent's statement more closely tracks the wording of the Court, while the Petitioners summarized the Court's opinion. Petitioner's statement, "The Court reasoned that because the discontinued standard at issue is a question of vesting under Washington law * * *" is correct. "Discontinuance" is one way to lose the right to a non-conforming use under Washington law, Oregon law, and the National Scenic Area standards. According to the Court of Appeals, a non-conforming use is called a "vested" right under Washington law. Hence under Washington law, whether a use is discontinued would be a vesting question.

This question of the relationship between vested rights and non-conforming uses (whether it be Washington's "law of vested rights" or "vested rights doctrine") only further illustrates the question presented in the Petition. Analyzing the relationship between these two concepts under *Washington* law produces the result that the Gorge Commission must apply state law to non-conforming uses because the Gorge Commission does defer to state law for vesting standards. However, analyzing the relationship between the two concepts under *Oregon* law produces a very different result. In Oregon, non-conforming uses, while protected (*see e.g.* Or. Rev. Stat. § 215.130) are not "vested rights." Once "vested," the land use exists and may be lost under different statutory and local government non-conforming use standards. *See e.g. Eklund v. Clackamas County*, 583 P.2d 567 (Or. App. 1978) and *Fountain Village Development Co. v. Multnomah County*, 31 P.3d 458 (Or. App. 2001).[1]

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[1] Although the Court in *Fountain Village* did note the close relationship between "vested rights" and the reason for "non-conforming use" standards, it nevertheless recognized that in Oregon these concepts address very different problems.

Another way of stating the issue is that Washington and Oregon use different terms; Oregon simply does not used the term "vested rights" to describe non-conforming uses. This case well-illustrates the difficulties of interpreting regional law under state law standards and terminology. State law and terminology should not be used to determine whether a fact pattern invokes an interstate compact standard; that should be the job of the Gorge Commission, which was created by the states to develop and ensure uniform application of land use standards. This Court should grant the Petition for Certiorari to clarify whether one state can force an interstate compact agency to interpret its standards only in accordance with that state's laws and terminology, especially when doing so conflicts with the very purposes of the compact.

Second, Respondent asserts that the Petitioners mischaracterize the arguments below. Petitioners noted in the Petition that Skamania County did not argue below that Washington's law of vested rights controls discontinuance of a non-conforming use. Pet. Br. 12 at n. 7. The Court of Appeals, in the instant case, developed that reasoning for the case *sua sponte*. App. 11a-14a. Petitioners stand by their argument; Respondents adopted this reasoning only after the Court of Appeals suggested at oral argument that this case should be controlled by the Commission's vesting provision.

II. RESPONDENT'S ASSERTION THAT THE GORGE COMMISSION SHOULD MERELY CLARIFY ITS RULES DOES NOT RESOLVE THIS CASE.

Throughout its opposition brief, Respondent argues that this Court need not accept this case because the Gorge Commission can and should be encouraged to simply have clear standards. Petitioners disagree. If the standard was so clear, why did Respondents not raise it on their own merit? Additionally, as noted above, Oregon law and terminology drastically differs from Washington in this respect.

More importantly, even if the standard were so clear that it did not require interpretation, the case would still raise the question of whether the Gorge Commission must apply state law. The Washington Court of Appeals gave six reasons why it believed the Gorge Commission must apply Washington's common law. The first five reasons cited by the Washington Court of Appeals relate solely to the "intent" of the Columbia River Gorge Compact. App. 8a–11a. Had the Court not interpreted the Compact then Respondent would be correct. But the Court's decision appears to be quite broad in holding that the Gorge Commission must interpret its standards in accordance with Washington's common law. The Washington Court of Appeals' parochial interpretation of the Columbia River Gorge Compact is precisely the type of interpretation of interstate compacts that this Court has said that a state cannot have the final word. *State ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951).

Respondent even asserted that "[t]he Gorge Commission may have already initiated the rulemaking process of amending its Management Plan to correct any perceived errors in the Washington Court of Appeals' interpretation." Opp. Br. 8. The Gorge Commission has begun reviewing the Management Plan in accordance with the National Scenic Area Act's requirement to do so every ten years. 16 U.S.C. § 544d(g). One of the categories of issues that the Gorge Commission has determined it will review is issues that have the subject of litigation. The issue of vested rights and nonconforming uses will be reviewed. However, the Management Plan review probably cannot correct the decision of the Washington Court of Appeals to the extent it requires the Gorge Commission to always interpret the terms of the Management Plan in accordance with Washington's common law.

Finally, Respondent argued that this case is limited to the "discontinued" standard at issue because "[p]etitioners have

not cited to, and respondent is unaware of, any other Management Plan provision which compels state law." Opp. Br. 7. This would be a good argument for the Respondent, *if it were true*. But Respondent forgets that it has already asserted to the Gorge Commission that this case and state law controls other Gorge Commission determinations, specifically what is a "parcel" of land in the National Scenic Area, even though the Gorge Commission has defined the term "parcel." Petitioners attach as Exhibit 1, a letter from Bradley Andersen, Skamania County Prosecutor and Attorney for Respondent, to the Columbia River Gorge Commission. Mr. Andersen wrote:

> In *Skamania County v. Woodall*, 16 P.3d 701 (Wash. App. Div. 2 2001), the Court of Appeals found that matters not resolved though examination of the Scenic Area Act or the Management Plan should be resolved by applying Washington law. * * * The Court of Appeals was clear in its direction that the Gorge Commission must consider Washington's case law to interpret land-use ordinances, even if they arise within the Scenic Area.

Exhibit 1 at 4a. This letter was not part of the record reviewed by the Courts below and is attached solely to reply to Skamania County's assertion that the decision of the Washington Court of Appeals concerns only the "discontinued" standard, which can be corrected by the Gorge Commission through rulemaking.

Through its own actions, Respondent believes that the Court of Appeals' decision applies very broadly—even to terms that the Gorge Commission has defined. It only asserts a narrow holding at this time in asking this Court to deny the Petition for Certiorari.

CONCLUSION

As demonstrated by Exhibit 1, the decision of the Washington Court of Appeals could have impacts well beyond the "discontinued" standard, which cannot be anticipated and "corrected" by rulemaking. Even the "clearest" terms may require some interpretation. This case is all about whether the Washington Court of Appeals can unilaterally constrain the Gorge Commission to interpret the regional provisions of the Management Plan for the Columbia River Gorge National Scenic Area in accordance with Washington common law when doing so defeats the uniformity of standards called for in the National Scenic Area Act. This Court should grant the Petition for Certiorari to correct the decision of the Washington Court of Appeals and bring clarity to the question of when a state may impose its own laws on an interstate compact agency.

Respectfully submitted,

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EXHIBIT

EXHIBIT

Bradley W. Andersen
Prosecutor

[SEAL]

Peter S. Banks
Chief Criminal Deputy
Christopher J. Dumm
Deputy

WRITTEN TESTIMONY OF SKAMANIA COUNTY PROSECUTING ATTORNEY BRADLEY ANDERSEN IN SUPPORT OF A CONSISTENCY DETERMINATION OF SKAMANIA COUNTY ORDINANCE 2000-11 (ANCIENT SUBDIVISIONS)

I. INTRODUCTION.

The Columbia River Gorge Commission has been asked to review Skamania County Ordinance No. 2000-11. This ordinance clarifies Skamania County Code ("SCC") Title 17 (Subdivision Title) to determine how and to what extent the County will recognize lots created prior to the modern subdivision and short plan regulations, colloquially referred to as "ancient subdivisions," This revision sets forth eight factors which the County must evaluate, on a case by-case basis, to determine whether a particular parcel, created by a pre-1937 subdivision, will be deemed valid. The clarification of SCC Title 17 merely reduces to writing what historically has been Skamania County's practice, and establishes clear and specific legislative standards, as recommended by the Washington State Attorney General, for review of such pre-1937 subdivision questions.

We believe you will find that this ordinance presents the County's best effort to legislatively clarify the issue of how to address ancient subdivision. This ordinance represents a reasoned and balanced approach to guide the County in evaluating these issues in the future. As endorsed by the Attorney General, this clarifying ordinance is consistent with

state law and does not run afoul of the Scenic Act or the Management Plan. Indeed, a finding that the amendment is inconsistent with the Management Plan will result in standard less review of pre-1937 subdivision located within the Scenic Area

II. ANALYSIS

A. The Executive Director Starts from the Wrong Premise.

The Executive Director's memorandum to you recommending against taking any action is misguided. Claire erroneously concludes that SCC Title 17 will not affect land-use within the Scenic Area and therefore no action is necessary. Make no mistake about it; Skamania County intends for this ordinance to have uniform effect on all lands located within and without the Scenic Area of Skamania County.

The Executive Director starts from the wrong premise. She argues that "the Title 22 definition of the 'Parcel' is more restrictive and thus prevails over the Title 17 definition of 'Lot' in accordance with SCC § 22.02.030.A.2." In fact, the definition of "parcel" in Title 22 is more expansive than, or at least the same scope as, the definition of "lot" in Title 17.

The Management Plan for the Columbia River Gorge National Scenic Area and Skamania County Code Title 22, defines "Parcel" as:

a. "Any parcel legally created by a short plat, partition or subdivision;

b. Any units of land legally created and separately described by deed or sales contract, deeds in lieu of foreclosure or judicial ruling prior to November 17, 1986, if there were do applicable planning, zoning and land division ordinances or regulations.

c. In the state of Washington, a unit of land created and separately described by deed or sales contract, deeds in lieu of foreclosure or judicial ruling after November 17, 1986 if the unit created was approved by the Gorge Commission or the Forest Service Scenic Area Office."

SCC 22.04(100); Glossary to the Management Plan for the Columbia River Gorge Scenic Area.

Since a "parcel" includes lots that were "legally created by . . . subdivision", it is clear that lots created by pre-1937 subdivisions fit within the definition of parcel, provided they have not been lost through abandonment or non-use. The question therefore is whether the regulatory agency can or should recognize parcels created by pre-1937 subdivision. The answer depends upon the individual circumstances and history surrounding that particular parcel, which necessarily requires a case-by-case analysis.

The Management Plan and SCC Title 22 do not distinguish between parcels created before or after 1937. The Management Plan and SCC Title 22 parcel definition *does not* exclude subdivisions created prior to 1937. If the Management Plan and SCC Title 22 intended to exclude pre-1937 subdivisions, it could have been written so as to limit the definition of "parcel." Instead, the definition incorporates all "parcels" recognized by pre- or post-1937 subdivision.

Indeed, the clarifying ordinance will actually serve to define what pre-1937 "lots" should be considered parcels through applying the eight carefully crafted factors. SCC Title 17 does not create the subdivision or lots, but merely provides standards for use in identifying those subdivisions and lots created prior to 1937 that are no longer valid.

B. Nothing. in the Scenic Act or the Management Plan Addresses the issue of Undeveloped pre-1937 Subdivisions

Neither the Scenic Act nor the Management Plan speaks to when the land divisions affected by a pre-1937 subdivision should be determined as having no effect. Given this void, it is appropriate for such determinations to be made by Skamania County, the jurisdiction charged with administering land use in Skamania County through its Scenic Ordinance, other county ordinances, and Washington state law. This conclusion flows not only from the administrative system established by Congress in the Scenic Act, but also from the Washington Court of Appeals. In *Skamania County v. Woodall*, 16 P.2d 701 (Wash. App. Div 2 2001), the Court of Appeals found that matters not resolved through examination of the Scenic Act or the Management Plan should be resolved by applying Washington law. This approach is the approach used by Skamania County in its amendment to Title 17. The Court of Appeals was clear in its direction that the Gorge Commission must consider Washington's case-law to interpret land-use ordinances, even if they arise within the Scenic Area.

C. Skamania County's Title 17 Adopts the Approach Endorsed by the Washington .Attorney General's Office.

Between 1973 and 1998, the Washington Attorney General's office issued three written opinions addressing pre-1937 subdivisions. The third opinion, issued in 1998, concluded there was no legal basis to require counties to "dishonor" those subdivisions platted before 1937. AGO 1998 No. 4. Taken together with the analysis in the two

earlier opinions, the Attorney General's opinions present three important conclusions:

- no bright line rule can be distilled by which counties can determine whether parcels created by pre-1937 subdivisions should be considered invalid;
- recognition of pre-1937 subdivisions should be considered on case-by-base basis; and
- County ordinances addressing pre-1937 subdivisions should set out clear substantive standards

AGLO 1974 No. 7; AGO 1996 No. 005; AGO 1998 No. 4.

In adopting it changes to Title 17, Skamania County has merely recognized and adopted the analysis set out in the three Attorney General's opinions. Unlike the Scenic Act or the Management Plan, Title 17 sets out clears substantive standards as suggested by the three opinions. In fact, this new ordinance's factors closely track the suggested factors contained in the 1998 opinion. *Compare Skamania County* Ordinance No. 2001-11 with AGO 1998 No. 4 ("There are too many variables for us to suggest any fixed 'bright line' . . ."). In adopting the analysis from the Attorney General's opinions, Skamania County is applying the best available legal analysis in the state of Washington addressing pre-1937 subdivsions.

The approach suggested by Executive Director Puchy would leave a legal void with respect to pre-1937 subdivions within the Scenic Area. This approach is contrary to the suggestion of the Washington Attorney General's office, and is a standard less approach. Without standards, the courts, and not the legislative bodies, will be left having to define the applicable guidelines to assess future question relating to the validity of "parcel." This is unnecessary and perhaps irresponsible. We, as legislative bodies, have a responsibility to provide this guidance to those who must review these issues.

A. Skamania County's Approach Mirrors Oregon's Approach and therefore Provides for a Uniform System of Laws.

The approach that Skamania County adopted in SCC Title 17 to evaluate parcels created by pre-1937 subdivisions on a case-by-case is identical to the approach used in the State of Oregon. In 1973, the Oregon legislature adopted an "Undeveloped Subdivision" law whose purpose was to ensure old, undeveloped subdivisions complied with current comprehensive planning and zoning ordinances. ORS 92.205-92.234. The statute sets forth a procedure for bringing the undeveloped subdivisions up to current standards. Significantly, however, these updating procedures are not required if the old subdivision remains operative and has been developed in some way. ORS 92.225. The statute sets forth five factors that shall be considered in determining whether a subdivision either qualifies as developed or is undeveloped and must conform to current land use laws. The statute provides:

> "(2) For the purposes of this section, the lands described in the plat of any subdivision under review shall be considered to be developed if any of the following conditions are found by the agency or body conducting the review to exist on such lands:
>
> (a) Roadways providing access into and travel within the subdivision have been or are being constructed to meet the specifications prescribed therefor by the agency or body that approved the plat of the subdivision;
>
> (b) Facilities for the supply of domestic or industrial water to lots created by the subdivision have been or are being constructed;
>
> (c) Sanitary sewerage disposal facilities have been or are being constructed for lots created by the

> subdivision, or septic tanks have been or are being installed on the land or permits have been issued for their installation on the land;
>
> (d) Buildings have been or are being constructed upon the land or permits have been issued for the construction of buildings upon the land; and
>
> (e) One or more lots described in the plat of the subdivision have been sold or otherwise transferred prior to the date of the initiation of such review."

ORS 92.225(2).

The five factors in the Oregon statute are similar to the eight factors set out in SCC Title 17. For example, ORS 225.225(2)(a) requires the agency or governing body to consider roadways in determining whether the subdivision is undeveloped. Similarly, SCC Title 17.08.010(11)(6) requires the County to evaluate whether "there has been any private or public recognition of the lots created by the pre-1937 plat by way of roads or other infrastructure." Under ORS 92.225(2)(e) the agency or governing body evaluates whether any of the lots have been sold or otherwise transferred prior to the date of initiation of the review. Similarly, Title 17.08.010(11)(1) and (3) requires the County to evaluate the sale and transfer of the lots in determining whether a legally valid lot exists.

Finding Skamania County's Title 17 amendment to be consistent with the Management Plan would provide for a system in Skamania County which is consistent with the approach mandated by statute in the three Oregon Scenic Area Counties. Consistency between the two states within the Scenic Area is one of the fundamental reasons for creation of the Scenic Area. Management Plan at p. 3 ("To achieve the purposes of the Scenic Area Act, Congress called for preparation of a Management Plan that would treat the two-state, six-county areas as a region.").

VI. CONCLUSIONS

No provision of the Management Plan or the Scenic Act is compromised by Skamania County's Title 17 amendment The amendment, which fully adopts the best available legal analysis on Washington state law pertaining to pre-1937 subdivisions, applies countywide. The amendment provides standards to situations which by their nature require fact-specific, case-by-case inquires. Without this ordinance, decision makers will be left standard less which will result in arbitrary and dissimilar decisions.

I hope you agree that this legislative clarification establishes an approach which mirrors Washington and Oregon law and which promotes a regional consistency on the issue of older undeveloped or partially undeveloped subdivisions. On their four corners, the Management Plan's and the County's Scenic Ordinance's definition of "Parcel" clearly can be construed to include parcels created by pre-1937 subdivisions. However, the Management Plan fails to address whether such parcels should, under certain circumstances, not be recognized as separate parcels. Skamania County's Title 17 amendment provides clear guidance on the factors to be used in making this determination, and is fully consistent with, Washington law, Oregon law, the Scenic Act [1], and the Management Plan. The Gorge Commission should find Skamania County's amendment to Title 17 to be consistent. Therefore, Skamania County hereby requests that you either not take action [2], or affirmatively find that the ordinance is not inconsistent with the Management Plan or the Gorge Act.

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[1] It is important to point out that nothing in the Gorge Act purports to address this issue. The County's ordinance therefore cannot be viewed as being inconsistent with the Act.

[2] Section 7 of the Gorge Act provides that, [s]hould the [Gorge Commission] fail to take action the ordinance shall be deemed to be approved."